But the Commission cannot use a problem it has itself created to justify overturning the plain language of Title VI.[75] Indeed, Congress clearly contemplated the possibility of an entity regulated under both Title II and Title VI in the exception to the common carrier exemption in the "cable system" definition.[76] In any case, nothing in the Cable Act definitions suggests that the Commission could create an exemption based on any potential overlap in regulatory regimes. Thus, there is nothing in the Commission-created concept of video dialtone that could justify

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[75]See, e.g., ACLU v. FCC, 823 F.2d 1554, 1565, 1567 (1987), cert. denied sub nom. Connecticut v. FCC, 485 U.S. 959 (1988) (where "there is an important distinction" between the Cable Act and the FCC's rule, the rule is invalid); Sierra Club v. Clark, 755 F.2d 608, 613 (8th Cir. 1985); Demarest v. Manspeaker, 498 U.S. 184 (1991).

[76]Section 3(b) of the 1984 Cable Act reaffirms that every entity subject to the Communications Act of 1934 remains subject to that Act as before, including communication by wire or radio through a cable system, excepting only "cable service" provided through a cable system. The legislative history specifically states with respect to Section 3:

> Subsection (a)(2) makes explicit that telephone companies which provide cable service are subject to the provisions of Title VI, notwithstanding the limitations on FCC jurisdiction contained in Section 2(b) of the Communications Act of 1934.
>
> Subsection (b) provides that H.R. 4103 does not affect any jurisdiction that the FCC may have over communications services, other than cable services, provided over a cable system. For instance, the addition of a new Title VI of the Communications Act, regarding cable services, does not limit any jurisdiction the FCC may otherwise have over other communications services provided over a cable system.

H.R. Rep. No. 934, 98th Cong., 2d Sess. at 95-96 (1984), reprinted in 1984 U.S.C.C.A.N. 4655 (1984).

infringing upon local communities' authority to require a local franchise under the Cable Act.[77]

VI. CONCLUSION

Congress constructed the Cable Act in such a way as to ensure that a self-programming video dialtone operator is subject to the local franchising requirements of the Cable Act. The Commission is not at liberty to override this congressional determination and to rewrite the law. Thus, self-programming video dialtone operators must be subject to the public interest goals and purposes reflected in the Cable Act.

Even if the Commission had the authority to wipe out the structure built by Congress to serve the purposes outlined above (and it does not), the Commission would be required by the public interest to ensure that the same purposes were served. If the Commission sought to serve those purposes without involving local communities in any way, the Commission itself would have to take over the task of crafting a regulatory scheme responsive to the entire range of different local needs and interests. But the Commission cannot assume such a role. The Commission is an independent federal agency. It is not sufficiently responsive

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[77]It should be noted that different services may nonetheless be regulated at different levels. For example, rates and terms may be regulated at the state and federal levels for intra- and interstate common carrier service, respectively, while a local franchise may still be needed to use the public rights-of-way for a cable system. Similarly, customer service issues (for instance) may be addressed at different points for cable service and telephone service, but local communities' underlying right to manage, and receive compensation for, their rights-of-way does not change.

to, or accountable to, local communities to negotiate for such needs and interests on their behalf. Nor, as a practical matter, does it have the information or the resources to do so. Even to imagine teams of FCC staffers spreading out across the nation -- to determine, for example, the extent of undergrounding necessary in Alexandria, whether poorer communities in Los Angeles are being adequately served, where two-way service is needed in Santa Clara, and how much support is required to enable public access in Indianapolis -- is to recognize how ludicrous such an attempt would be.

Even if the Commission could somehow accomplish the task of serving as a "big brother" to manage communications infrastructure and local needs and interests in every community across the nation, it would be misguided to create such a massive federal bureaucracy to accomplish what each community could and should do for itself. Instead, the Commission should concentrate its efforts on those issues that actually require a national approach, such as the establishment of standards to ensure interoperability of different telecommunications systems.

This does not imply that Cable Act franchising is the only possible way to achieve the ends described above. It might well be possible for Congress to change the law and establish different ways of addressing those ends. But that is not the Commission's responsibility. Until Congress changes the statute, however, it is the Commission's responsibility to apply the Cable

Act, which requires that self-programming video dialtone operators be subject to local franchises.

Under existing law, the Commission's mandate is clear. Any video dialtone operator permitted to provide video programming directly to subscribers over its own system is required by the Cable Act to obtain a local franchise. The Commission should therefore include in all § 214 grants the express condition that the applicant must demonstrate, within a specified time after the grant, that it has received the necessary local franchise (unless it can show that the local franchising authority does not require such a franchise).[78] To the extent the Commission takes any steps that would undermine this legal requirement, it would merely be conferring on telephone companies a market-distorting

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[78]Cf. Souris River Telephone Mutual Aid Corp., FCC 60-254, 28 FCC 275, 19 R.R. 1117 at ¶¶ 9, 11 (1960) (Commission is bound to abide by determination of local authorities to grant, or not to grant, a franchise or authorization).

subsidy, to the direct detriment of local property rights and to competition.

Respectfully submitted,

THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE CITY OF ALEXANDRIA, VIRGINIA; THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY; ANNE ARUNDEL COUNTY, MARYLAND; THE CITY OF BALTIMORE, MARYLAND; BALTIMORE COUNTY, MARYLAND; THE CITY OF DALLAS, TEXAS; HOWARD COUNTY, MARYLAND; THE CITY OF INDIANAPOLIS, INDIANA; THE CITY OF LOS ANGELES, CALIFORNIA; MANATEE COUNTY, FLORIDA; MONTGOMERY COUNTY, MARYLAND; PRINCE GEORGE'S COUNTY, MARYLAND; AND THE CITY OF SANTA CLARA, CALIFORNIA

By 

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Their Attorneys

March 21, 1995

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APPENDIX

A. Community Benefits Provided by Selected Local Franchise Agreements

B. Nicholas P. Miller, Local Government: The Silent Investor in Wireline Telecommunications Networks, in Local Government Roles and Choices on the Information Superhighway: Tenants or Architects of the Telecommunications Future? (PTI, 1994)

C. National Performance Review:
Statement on Reinventing Regulation

APPENDIX A

Community Benefits Provided by Selected Local Franchise Agreements

CITY OF ALEXANDRIA, VIRGINIA

1.	**Date and Term:**	June 1994 (15 years).
2.	**Franchise Fee:**	3% of gross revenues.
3.	**Annual Franchise Fees:**	$442,968 (July 1, 1993 - June 30, 1994).
4.	**Other Payments:**	Capital grants for access: $1,000,000 plus $500,000 in each of years 4 through 15.
5.	**Access Channels:**	Currently 3; after rebuild, 4. Under certain conditions, up to 8.
6.	**Service to Schools and Government:**	At City's discretion, one or more free drops and basic service to each school, local government office and city-owned or city-leased residential structure up to a maximum of 250 drops.
7.	**Local Origination Programming Provided:**	Thirty or more hours per week, phased in over three years, including at least 10 hours of first-run programming produced by franchisee.
8.	**Coverage of Community Events:**	Live coverage of all City Council, Planning Commission, Board of Zoning Appeals and School Board Meetings, plus high school graduation ceremonies and national, state and local elections in the City.
9.	**Institutional Network:**	Two-way fiber optic system connecting all schools, libraries, courts, city offices and agencies.

ANNE ARUNDEL COUNTY, MARYLAND

1.	**Date and Term:**	North - 1985 (15 years). South - 1985 (15 years). Intermedia - 1990 (15 years). TCI - 1990 (15 years).
2.	**Franchise Fee:**	North - 5% of gross revenues. South - 5% of gross revenues. Intermedia - 4.5% of gross revenues through 9/95, thereafter 5%. TCI - 4.5% through 9/95, thereafter 5% of gross revenues.
3.	**Annual Franchise Fees:**	$1,590,000 (aggregate).
4.	**Other Payments:**	Aggregate of $2,000,000 over 5 years to construct I-Net.
5.	**Access Channels:**	Three per system (one each for public, educational and governmental access). Franchisee to provide additional channels under certain conditions.
6.	**Service to Schools and Government:**	Public schools and governmental buildings receive free drops.
7.	**Local Origination Programming Provided:**	Aggregate of 410 hours per month.
8.	**Coverage of Community Events:**	Coverage of County Council meetings free or at reduced rates on two of four systems.
9.	**Institutional Network:**	Franchisees constructing a two-way fiber optic system which shall connect certain County agencies and buildings.

BALTIMORE COUNTY, MARYLAND

1.	**Date and Term:**	April 1973 (25 years).
2.	**Franchise Fee:**	5% of gross revenues.
3.	**Annual Franchise Fees:**	$3,886,235 (January 1, 1994, through December 31, 1994)
4.	**Access Channels:**	Currently 7. Franchisee to provide additional channel upon demonstrated need. Each community college is assigned a cable channel. Franchisee provides equipment and personnel to link each college's production studios to cable system.
5.	**Free Service to Schools and Government:**	Franchisee provides free installation, maintenance and service to all public or quasi-public buildings or facilities.
6.	**Local Origination Programming Provided:**	Franchisee to provide local, state and regional news, events and public affairs programming.
7.	**Coverage of Community Events:**	Bi-monthly coverage of County Council meetings, quarterly interviews with community groups and non-profit organizations. Ran over 20,000 public service announcements in 1994.

DALLAS, TEXAS

1.	**Date and Term:**	1980 (20 years).
2.	**Franchise Fee:**	5% of gross revenues.
3.	**Annual Franchise Fees:**	$3,028,012.
4.	**Other Payments:**	$750,000 and $700,000 in years one and two of franchise, respectively; thereafter, $500,000 per year to support public access, plus $100,000 per year for access equipment in years 1988 through 1994.
5.	**Access Channels:**	Seven.
6.	**Service to Schools and Government:**	All schools and city government buildings receive cable drop.
7.	**Institutional Network:**	Located in central business district.

HOWARD COUNTY, MARYLAND

1.	**Date and Term:**	Comcast - 1988 (8 years). Midatlantic - 1988 (15 years).
2.	**Franchise Fee:**	5% of gross revenues.
3.	**Annual Franchise Fees:**	Approximately $1,000,000 (aggregate).
4.	**Access Channels:**	Three per system. Each franchisee to provide an additional channel within next year.
5.	**Service to Schools and Government:**	Free drop and expanded basic service to all schools and government facilities.

INDIANAPOLIS, INDIANA

1.	**Date and Term:**	American: Feb. 1981 (15 years). Comcast: May 1967 (25 years).
2.	**Franchise Fee:**	American: 3% of gross revenues. Comcast: 3% of gross revenues.
3.	**Annual Franchise Fees:**	American: $832,000 (1994). Comcast: $1,223,000 (1994).
4.	**Other Payments:**	Both franchisees support educational access intern position.
5.	**Access Channels:**	Three per system.
6.	**Service to Schools and Government:**	Each franchisee provides one drop and basic service to all institutions passed by its system, including schools, libraries, museums, churches and government buildings.
7.	**Local Origination Programming Provided:**	American: Approximately 27 hours per week of original programming. Comcast: Approximately 10 hours per week of original programming.
8.	**Institutional Network:**	American: Two-way coaxial cable with downstream capacity of 25 video channels and upstream capacity of 16 video channels. Fifty-five institutions currently on network, including fire stations, police, hospitals and universities.

MONTGOMERY COUNTY, MARYLAND

1.	**Date and Term:**	1983 (15 years).
2.	**Franchise Fee:**	5% of gross revenues.
3.	**Annual Franchise Fees:**	$4,387,085 (FY 94).
4.	**Other Payments:**	1.5% annual PEG access grant ($1,316,116 in FY 94), plus $6,000,000 payment in FY 94 for upgrade of institutional network.
5.	**Access Channels:**	Thirteen.
6.	**Free Service to Schools and Government:**	One drop and basic service to all state and local government agencies, public and non-profit educational institutions and certain non-profit health care institutions.
7.	**Local Origination Programming Provided:**	87,398 hours provided in FY 94.
8.	**Coverage of Community Events:**	Extensive coverage of City and County governmental, educational and community activities.
9.	**Institutional Network:**	Two-way voice, data and video network connecting several public buildings. Network being upgraded to fiber.
10.	**Other Benefits:**	If a new fiber-optic network is built, 4.8 Gbps of capacity on 2 fibers covering 300 miles.

PRINCE GEORGE'S COUNTY, MARYLAND

1.	**Date and Term:**	North - July 1982 (15 years). South - July 1982 (15 years).
2.	**Franchise Fee:**	5% of gross revenues.
3.	**Annual Franchise Fees:**	North - $1,122,060. South - $1,359,163.
4.	**Other Payments:**	North - $100,000 per year for public access support plus $100,000 per year for educational access support. South - $100,000 per year for public access support.
5.	**Access Channels:**	Eight. Additionally, two channels on subscriber network used by school system for distance learning and one closed loop channel in County Administration Building.
6.	**Free Service to Schools and Government:**	All public schools, police stations, libraries and government buildings have one drop and basic service. Schools receive free internal wiring.
7.	**Local Origination Programming Provided:**	County government messages carried on information channel.
8.	**Coverage of Community Events:**	By independent PEG access corporation.
9.	**Institutional Network:**	Two-way fiber optic system connecting all schools, libraries, courts, city offices and agencies.

CITY OF SANTA CLARA

1.	**Date and Term:**	January 1971 (25 years).
2.	**Franchise Fee:**	3% of gross revenues.
3.	**Annual Franchise Fees:**	$210,000.
4.	**Access Channels:**	One.

APPENDIX B

Nicholas P. Miller, Local Government: The Silent Investor in Wireline Telecommunications Networks, in Local Government Roles and Choices on the Information Superhighway: Tenants or Architects of the Telecommunications Future? (PTI, 1994)

Local Government: The Silent Investor in Wireline Telecommunications Networks

Prepared for Public Technology, Inc.
by Nicholas P. Miller, Miller & Holbrooke

ABSTRACT

In "Local Government: The Silent Investor in Wireline Communications Networks," Nicholas P. Miller argues for the conceptual separation of local regulatory power from local franchising authority, claiming that confusion of the two threatens local government interests in the face of mounting pressures from the telecommunications industry.

Most local officials, Miller believes, do not realize that they are, in fact, "in charge of the telecommunications landscape." In Miller's view, it is vital that local government recognize the magnitude of its role, which he describes as one of promotion, consumption, regulation, and investment. Local governments, which have long encouraged telecommunications expansion to bring better, lower-cost coverage to their communities, are now second only to the federal government in service consumption. Taken collectively, they are the largest single investor in telecommunications businesses that use wires in the public rights-of-way. Miller reminds cities and counties that they "own and make available to telecommunications wireline providers, through the local franchise process, the most valuable property used by telecommunications companies—the public rights-of-way." Thus, franchising is local government's most important investment in the telecommunications industry.

Too often, Miller believes, the debate in Washington equates franchising with regulation, in part because the two are often embodied in a single public-private contract. He insists, however, that the two be separated, at least conceptually: "Regulation," he writes, "is the exercise of [government's] inherent police power. Franchising is the grant of valuable property rights [for a dedicated purpose and for a specific compensation to the local government]." Doing so, he implies, foregrounds local government's stake in the emerging NII-related battle between the federal government, private industry, and local communities: loss of billions of dollars' worth of public property. According to Miller, the Clinton administration and Congress—claiming to "simplify" regulations, bowing to telecommunications companies that wish to use existing, service-specific franchises to provide new, non-traditional services with no further local permission—are proposing to transfer that property "essentially cost-free to private investors." Miller urges local authorities to "insist that each use of the public rights-of-way requires explicit franchise grant," thereby ensuring fair compensation.

In the end, Miller suggests, regulatory power sans franchising authority is toothless. Separating the two, so that one is not assumed by or subsumed within the other, so that neither power is easily challenged, is his answer to the local telecommunications policy dilemma.

Local Government: The Silent Investor in Wireline Telecommunications Networks

Introduction

Telecommunications is central to the role and responsibilities of local officials. After all, there are hundreds of billions of dollars at issue for local government budgets. Local governments are the second largest customer of telecommunications companies (second only to the federal government). Local governments are the largest single investor in wireline telecommunications businesses, or those that use wires in the public rights-of-way. Communities own and make available to wireline telecommunications providers, through the local franchise process, the most valuable property used by telecommunications companies—the public rights-of-way.

Most local officials see themselves as proponents of expanded telecommunications services—telephone, cable television, public dispatch radio, and broadcasting. These useful services are usually provided by private investors who operate under a public license, issued by the Federal Communications Commission (FCC), the state utility commission, and/or the local government. Local officials readily see themselves both as advocates of additional investment and service expansion and as large customers of these businesses. Occasionally, when telephone or cable television services or business practices deteriorate, local officials call for stronger regulatory actions to protect local consumers and others dependent on these services.

Usually, however, local officials see themselves as advocates for their voters, not as leaders in charge of the telecommunications landscape.

The telephone and cable television operators who use the public rights-of-way have encouraged this attitude in local government. They have loaded telecommunications policy discussions with jargon and acronyms that discourage informed debate. Local governments seldom have the time or experience to contemplate the issues presented by the changing telecommunications landscape. Most local officials have heard that new and strange technologies are coming soon in telecommunications. But there is little awareness that these changes place local government at the center of the maelstrom. Nor is there awareness that the telephone and cable television industries are pushing the White House and Congress to a quick and fundamental preemption of local governments' property rights. Congress is moving now to deprive local government of current real estate rights that will be worth hundreds of billions of dollars in the telecommunications world of the future. Congress is proposing to transfer these rights essentially cost-free to private investors seeking to use the public rights-of-way for wireline telecommunications networks.

This paper discusses that reality.

Telecommunications Regulation Is Different from Local Franchising.

Government plays four roles in telecommunications: promotion, consumption, regulation, and investment. Good policy analysis requires differentiation between these four roles, even though some government actions may combine more than one.

Federal and local governments are major promoters of improved and expanded telecommunications services. Many telecommunications technologies—including, for instance, satellite, laser, and digital communications—were originally developed within the U.S. Department of Defense and then made available to the private sector. Like the federal government, local governments have catalyzed private-sector development of telecommunications technology. In the 1960's and 1970's, for example, many local governments encouraged cable television operators to build systems wherever economically feasible. On the consumption side, federal and local governments are the largest consumers of telecommunications services today. Not surprisingly, governments are strong advocates of improved services and new technologies that can expand coverage and reduce costs.

In sharp contrast to promotion and consumption, the government roles of regulation and investment are not always so visible. Regulation can occur in many forms—terms and conditions of contracts that create service obligations, legislation that conditions market entry or requires fair business practices, and regulatory agencies that create and enforce specific market and sector standards. Government investment can also occur in many forms—obvious examples are joint ventures or public/private enterprises where each party contributes essential capital, either in cash or in kind, and expects a payout on this investment over time. Less obvious government investments are subsidies, preferential taxes, or payments that encourage faster development; government research and development provided at little or no cost to private investors; or contributions of government property below fair market value to reduce investment risk or encourage early development. The payoff for these government investments may be an expanded tax base, faster overall economic development, more jobs, or direct financial dividends.

Local franchising is the most important form of local investment in the telecommunications industry. Different telecommunications technologies use different transmission media. Broadcasting and satellite services, for example, use federally controlled radio spectrum. The federal government is actively considering spectrum auctions to capture part of the value of this resource for the taxpayer. Telephone, cable television, and long-distance companies, in turn, use mostly copper wires built in public rights-of-way to transmit their signals. Local governments are usually the trustees of these properties and negotiate the terms and conditions of their use.

Too often, the debate in Washington assumes that franchising and local regulation are synonymous. These two activities are quite distinct. Regulation is based on the government's inherent police power to set minimum behavior standards for society, or for a particular industry. Franchising is the grant of a real property interest—an easement to use the public rights-of-way—for a dedicated purpose and for a specific

compensation to the local government. Often, for convenience, both actions may be embodied in a single document—a franchise agreement or contract. This document does several things simultaneously. It gives a property right to the operator to use the public rights-of-way. It states the compensation the operator will give the local government in exchange for that property right. (This compensation usually includes an explicit franchise fee payment as well as other valuable contributed services, such as service below cost, or specific equipment grants.) Then the agreement may go on to assert certain regulatory standards that the operator agrees to accept and obey.

Conceptually, it is critical to segregate regulation from franchising. Regulation is the exercise of inherent police power. Franchising is the grant of valuable property rights.

Local Franchises Are Valuable Property Rights within the Custody of Local Officials.

Public rights-of-way are the most valuable property rights now in the hands of any level of government. Popular press coverage of federal government off-shore drilling leases, mining leases, and forestry sales may make those properties better known. But no one can dispute both the volume and the value of public rights-of-way. There are many more claimants and potential users than available rights-of-way. Every city's rush hour attests to the need to allocate limited rights-of-way on an equitable basis among competing users and demands. And local governments instinctively realize that rights-of-way franchises should be competitively bid to the highest-paying and best use.

Different systems of franchising have evolved for different rights-of-way uses. But the underlying principles have remained constant. Public rights-of-way are acquired through eminent domain—the most intrusive form of governmental action in citizens' lives outside of the criminal code. Therefore, local officials have absolute obligations to act as trustees of the public's interest in shaping the use of the rights-of-way to best benefit the community in exchange for fair compensation.

Each system of franchises has developed under the influence of the particular industry seeking to use that franchise. The street railway franchise system focuses heavily on construction standards and obligations to remove equipment. The natural-gas distribution franchise system focuses extensively on safety and location of equipment under the road surface. The telephone franchise system has evolved with the economics of the industry. In the 1880's, when cities encouraged competition and multiple providers, franchises carried few conditions. As AT&T came to dominate the industry, cities recognized they could not control the company's behavior in isolation and supported efforts to create state regulatory commissions where statewide information could be consolidated and expert regulatory staffs hired. But most local governments retained active franchising, using the franchise to require that the telephone company submit itself to state regulation. In time, telephone service franchising became routine and long-term, with the perception that the public was being compensated for rights-of-way use through regulated prices and universal service. This was especially true when there was no competitive alternative to traditional telephone service.

The cable television franchise system followed a unique developmental path. Broadcast television was seen as an important "but not an essential utility service." Cities without adequate broadcast service tried desperately in the 1950's and 1960's to induce entrepreneurs to build community antenna systems that could deliver television signals from faraway metropolitan areas. Franchises were thus written to create investment incentives, with few—if any—public service obligations. That began to change in the early 1970's, as the Federal Communications Commission adopted national rules encouraging local governments to require local community programming by community antenna system operators. In 1976, when HBO went on satellite and the cable television industry finally had a unique product to sell in competition with local broadcasters, the franchising gold rush was on in major metropolitan areas. Local governments reacted with a competitive bid system for awarding cable franchises. The cable industry claimed that only one cable operator could survive in a community, and economists verified that "cable is a natural monopoly." Local governments found that the franchise for use of public rights-of-way was extremely valuable to cable entrepreneurs. Bids became more and more competitive in the late 1970's and early 1980's. The industry reacted by going first to the FCC and then to Congress, claiming that local governments were "charging too much" for the franchises. In time, Congress accepted industry's arguments and passed the 1984 Federal Cable Act, which preempted the consideration or payment local

governments could receive for cable franchises. The 1984 law limited franchise payments to five percent of an operator's gross revenues and to capital equipment grants related to non-commercial uses of the cable system.

Converging Telephone and Cable Television Technologies Set up the Current Confusion between Regulation and Franchising.

Traditional telephone and cable television technologies are distinct and separate. The network architecture for telephony specialized in carrying low-volume electronic messages from one point to another. This "switched, point-to-point" service was extremely valuable and important to overall economic development. But it was limited in its ability to carry high-density traffic, such as color video signals or high-speed computer communications. Moreover, the telephone company had no economic incentive to "own" the information on its network. It made more money by having more users, each creating his or her own information.

The network architecture for cable television was entirely different. Because a cable operator wants to deliver the same information to every subscriber on the network, the cable system is designed to consolidate many video signals at a single point, the system headend, then distribute those signals simultaneously over a high-capacity (coaxial copper) wire that passes every home in the community. This "point-to-multi-point" or "broadcast by wire" system has no switching capacity. Every subscriber (though restricted by filters and traps from seeing unauthorized signals) receives the same signals as every other subscriber. And the cable operator seeks to own or, at least, to control the information on the network, since subscribers pay for the right to see information created by others. The owner of the information gets the financial benefit.

The two worlds—that of telephony and that of cable television—coexisted peacefully until 1991.[1] While telephone wires could carry video, the special equipment needed to do so was so expensive that a telephone company had no chance of offering service competitively priced with that of a cable operator. And while cable coaxial wires had the capacity to carry voice signals, investments in switching and upgraded system reliability precluded cable operators from pricing a switched voice service competitively with existing services offered by the telephone company. In other words, two wires into the home, each serving specialized markets, constituted the most competitive and economically stable arrangement for both industries.

That scenario changed when the cable television industry developed the capacity to use fiber-optic cables to replace parts of its coaxial-copper-wire network. Cable economics, not the prospect of new services, drove this replacement. Optical fiber costs less per foot, requires less electricity and less maintenance, and offers more reliability than coaxial copper wire. It makes economic sense for a cable operator to replace coaxial cable through much of its "backbone distribution" network whenever existing coaxial cable is due for replacement. Fiber does, however, have a serious economic drawback. Fiber transmits information in the form of light. Consumer televisions receive signals in the form of electrical pulses. Using fiber on a cable television system requires a converter device. And these devices remain relatively expensive—too expensive to provide a separate converter for each customer. Today, the cable industry prefers one optical conversion point to serve 200-400 subscribers. Thus, cable networks are being rebuilt to take a single fiber to a "node" in each neighborhood, where the fiber's light signal is converted to electrical impulses and transported the rest of the way—on existing coaxial copper wires—to the subscriber's television.

Both industries see this "fiber to the neighborhood" as fundamentally changing current and future service markets for telephone and cable operators. Fiber-optic wires have lots of capacity and can do more than simply carry entertainment video signals. For example, they can carry telephone calls between cellular radio cell sites served by a fiber node. And fiber nodes can be located in high-density office buildings and hooked directly into existing telephone wires in the buildings. If the cable operator can persuade AT&T or MCI to pick up these signals at the cable headend, that operator can offer business telephone users access to switched telephone service outside the city with no investment in expensive telephone switches.

This change has accelerated telephone industry interest in securing the legal authority it needs to offer cable

television service. With this authority, the telephone industry could offer new services that would justify rapid deployment of fiber-optic wires to neighborhood nodes—provided, that is, its local franchise permitted such services. This pursuit of new authority has led telephone companies to claim that their existing state telephone licenses and local telephone franchises already entitle them to use the public rights-of-way for cable television purposes.

Local Authorities Should Insist That Each Use of the Public Rights-of-Way Requires Explicit Franchise Grant.

Local government is at risk. The legislative proposals by the Clinton administration and by Congressmen Markey and Fields propose to preempt local franchising authority over public rights-of-way. The legislation is moving forward on statements by the telephone and cable industries that they need regulatory clarity and simplification. The proposals direct the FCC to take control away from local governments and preclude localities from requiring a right-of-way franchise for new telecommunications uses. At the same time, the cable television industry is advocating state and federal legislation that will "level the playing field" between telephone companies and cable operators, eliminating any requirement that a cable operator must negotiate new rights as it seeks to use existing franchises for non-traditional cable system services.

At worst, local governments risk losing all right to negotiate the terms and conditions for new telecommunications networks seeking to use the public rights-of-way. Recent negotiations between local governments and cable operators have yielded high-value telecommunications networks for local government use as compensation for grant or renewal of a franchise. In the future, these networks can bring enormous direct savings to cities and counties on local telephone charges and specialized high-density, high-volume use charges. Indirectly, they will save localities money in a variety of areas: reduced police overtime through remote video arraignment, reduced teacher requirements through video classes for specialized topics, and reduced administrative costs through greatly enhanced information management in real-property and business-licensing database services. Cost-saving applications will multiply as local government gains experience in advanced computing and communications.

Local governments own valuable property that telecommunications companies want to use for their own profit, and at no charge. Local authorities must be free to balance the issues surrounding fair compensation to the community for use of its public rights-of-way, and free to set the terms, conditions, and value of that use.

Local control of rights-of-way does not preclude a rationalization of regulatory responsibilities. It is appropriate for the FCC to set minimum standards for all telecommunications operators. It is appropriate for state and regional regulatory authorities to correct market problems and bad behavior by large telecommunications companies. At the same time, it is appropriate for local authorities to define community needs and interests that new technologies must serve. Regulation is separate and distinct from the right of local communities to get fair value for private use of their rights-of-way.

Notes

[1] The development of various radio spectrum technologies (such as Direct Broadcast Service (DBS) and Satellite Master Antenna (SMA), subscription microwave television, cellular radio, and broadcast subcarrier services) will not affect the continued dominance of telephone and cable television systems. The economics and signal transmission characteristics of these radio spectrum technologies make them less desirable and less cost-effective than transmission by fixed-cost wires, whether copper or fiber-optic. Each of the "alphabet soup technologies" has certain specific advantages and will find a significant niche market. None, however, currently offers an effective competitive alternative to either the telephone or the cable network. The niche technologies will not be a true low-cost substitute for telephone or cable service. Moreover, if the federal government begins to charge for the use of radio spectrum, the niche technologies will be severely handicapped. In any event, where a given niche technology offers specific advantages, cable and telephone operators are already incorporating these technologies into their networks.

APPENDIX C

National Performance Review
Statement on Reinventing Regulation

Reinventing Regulation

All Regulators Will:

- ☑ Cut obsolete regulations
- ☑ Reward results, not red tape
- ☑ Get out of Washington—create grass roots partnerships
- ☑ Negotiate, don't dictate

Bill Clinton Al Gore

February 22, 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
TELEPHONE COMPANY-	)	
CABLE TELEVISION	)	CC Docket No. 87-266
Cross-Ownership Rules,	)	
Sections 63.54 - 63.58	)	

To: The Commission

REPLY COMMENTS OF THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE CITY OF ALEXANDRIA, VIRGINIA; THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY; ANNE ARUNDEL COUNTY, MARYLAND; THE CITY OF BALTIMORE, MARYLAND; BALTIMORE COUNTY, MARYLAND; THE CITY OF DALLAS, TEXAS; HOWARD COUNTY, MARYLAND; THE CITY OF INDIANAPOLIS, INDIANA; THE CITY OF LOS ANGELES, CALIFORNIA; MANATEE COUNTY, FLORIDA; MONTGOMERY COUNTY, MARYLAND; PRINCE GEORGE'S COUNTY, MARYLAND; AND THE CITY OF SANTA CLARA, CALIFORNIA, ON THE FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

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